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IN THE

Supreme Court of the United States

October Term, 1956

No. 317

FREDERICK J. CUTTING, ET AL.,
Petitioners,

v.

HARVEY V. HIGLEY, ADMINISTRATOR OF VETERANS AFFAIRS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioners, Frederick J. Cutting, Josephine B. Larsen and Maybelle R. Maloney, Appellants below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered on May 17, 1956 (A 17).

OPINIONS BELOW

The United States District Court for the District of Columbia did not render an opinion in this case. The opinion of the United States Court of Appeals for the

District of Columbia is set forth on pages 13-16 of the Appendix, and has not yet been printed in the Federal Reporter.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on May 17, 1956 (A 17). This petition for certiorari is filed within ninety days thereafter in accordance with the provisions of Title 28 U.S.C. Section 2101(c).

QUESTIONS INVOLVED

1. Whether in a reduction in force in the number of employees in a section of the New York Regional Office of the United States Veterans Administration the officials in charge may personally select the employees to be retained and totally disregard the provisions of Section 12 of the Veterans Preference Act of June 27, 1944 (5 U.S.C. 861).

2. Whether the petitioners, all permanent civil service employees and veteran preference eligibles all having longer retention credits, may, in a reduction in force in the Regional Office of the United States Veterans Administration, be reduced in grade, and employees of lesser retention credits be selected to be retained in their present status.

3. Whether the provisions of Section 12 of the Veterans Preference Act of June 27, 1944 (5 U.S.C. 861) are mandatory and binding on administrative officials of the United States Veterans Administration, or may such officials exercise a discretion as to what employees are to be retained, and others reduced, in a reduction in force in the Regional Office of the United States Veterans Administration.

STATUTE INVOLVED

"Sec. 861. Reduction in personnel; considerations affecting release. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings; Provided, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service; Provided further, That preference employees whose efficiency ratings are below 'good' shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: And provided further, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions. (June 27, 1944, ch. 287, Sec. 12, 58 Stat. 390.)"

5 U.S.C. 861

STATEMENT OF THE CASE

The petitioners brought their suit against the Administrator of Veterans Affairs, and the members of the United States Civil Service Commission praying for a declaratory judgment fixing and determining their rights as permanent civil service employees of the United States, and as veteran preference eligibles, and demanding that a mandatory injunction be issued to the defendants requiring the said defendants to restore them to their proper positions and grades in governmental service. The District Court first denied the defendants' motion to dismiss the action. On a hearing before a different Judge of the

District Court the defendants' motion for a summary judgment was granted (61A). From this judgment the petitioners appealed, the judgment of the District Court was affirmed.

The petitioners, Frederick J. Cutting, Joseph B. Larsen, and Maybelle R. Maloney were permanent civil service employees of the United States, and veteran preference eligibles as that term is defined in the Veterans Preference Act of June 27, 1944 (5 U.S.C. 851). They were employed in the Regional Office of the United States Veterans Administration in New York City, New York. In January, 1953 the petitioners held a grade known as a GS-7, and their particular type of work was confined to a group of 36 employees. The superiors of the petitioners were advised that there should be a reduction in force from the 36 employees to 27 employees. This reduction in force actually took place. The petitioners contend that the reduction in the force was a "reduction in force" such as is contemplated under Section 12 of the Veterans Preference Act (5 U.S.C. 861). In making the selection of who was to be retained in the grade of GS-7, or whatever grade was to be allocated, the selection was not made on the basis of retention points but the employees retained were the personal selection of the superiors of the petitioners.

The petitioners contend, and the reduction in force statutes and regulations sustain their contention, that in a reduction in force where all of the employees are fully qualified, such as in this case, that the law requires that the employee with the highest retention points must be retained.

There is no dispute that the 27 employees who were retained in the grade of GS-7 were selected by the balloting, and that no attention was paid to the requirement of law that the employee with the highest retention points, who is otherwise qualified should be retained,

and the employees with the least retention points be reduced in grade. The United States Court of Appeals for the District of Columbia in deciding this case below held that the petitioners were contending that they were entitled to a "promotion". The fact is that the Court below overlooked the fact that when the selections for retention in the grade in which the petitioners and the 33 others were employed that at that time there was no evidence what grade which might be later assigned to the group retained or that it would be a higher grade of GS-8. The petitioners contend that their rights to retention in the reduction in force must be measured at the time that the selection of the personnel to be retained in the reduction in force was made, and that the fact that later the position might have been raised to a grade of GS-8 is beside the point.

What they were seeking, and are now contending as stated before, is that their rights must be determined on the facts as they existed at the time the selections were made, and that the public officials had no right to make selections of those to be retained in the section in question based upon personal preference, and disregarding the statutory rule that those with longer retention credits must be retained which is clearly what the statute requires.

Most of the employees retained in the section in question had less retention points than the petitioners which the petitioners assert is a plain and wilful violation of law. The petitioners were reduced in grade from the grade of GS-7's to the grade of GS-4's, representing a very substantial loss in salary and grade.

SPECIFICATIONS OF ERRORS TO BE URGED

The petitioners will urge that the decision of the United States Court of Appeals for the District of Columbia in this cause is contrary to the facts, and the

law applicable. That the Court below erred in failing to decide that the petitioners have a preferential right of retention in their respective grades in accordance with the provisions of the Veterans Preference Act of June 27, 1944 (5 U.S.C. 861), and the lawful regulations of the United States Civil Service Commission.

REASONS FOR GRANTING THE WRIT

The petitioners assert that a writ of certiorari should be granted under Subdivision (b) of Part V of Rule 19 of this Court in that the Court below has decided an important federal question in conflict with the applicable decisions of this Court, and clearly in conflict with the federal statutes, and the regulations of the United States Civil Service Commission which have been sustained by this Court.

This case, while it involves only three employees of the United States government, is very important because if public officials can violate the rights of such employees by the exercise of a personal preference, then the rights of such employees established by Congress of the United States are entirely worthless.

This Court, in the case of Fishgold v. Sullivan Dry Docks and Repair Corporation, 328 U.S. 275, 90 L.Ed. 1230, construed seniority rights under a labor contract and reversed the lower courts. The statutes and the regulations of the Civil Service Commission establishing seniority rights of preference in a reduction in force are similar to the rights under a contract between a labor Union and employers. This Court later, in the case of Trailsmobile Co. v. Whirls, 331 U.S. 40, 91 L.Ed. 1328, also construed employment rights of a returned veteran of World War II under the contract between the Union and the employer. In both of the above cases the senior-

ity rights of the employee were predicated upon the length of service. The same situation exists in this case.

Seniority rights of government employees depend upon their classification grades. All of the petitioners in this case were permanent civil service employees having the highest classification for retention in governmental service in the event of a reduction in force. All employees of the government in the same class as the petitioners are placed on a "retention list" to be used when a reduction in force occurs. The employee with the highest number of retention points, and this means the number of years he or she has been employed, receives a certain number of retention points. If all are in the same classification such as permanent civil service employees with veterans preference, the names are placed on the retention list in the order, the first name appearing on the said list will be the employee who has the longest retention credits. That simply means the longest years of service.

This list is made primarily to show who must first be discharged or reduced in grade, and the start is with the lowest name on the retention list. Thus those employees with the lesser retention points are first discharged or reduced in grade. As stated before, the procedure in selecting employees for discharge or being reduced in grade as required by the statutes and regulations of the Civil Service Commission is in accord with the provisions in the labor contracts previously construed by this Court in the two cases before cited.

The facts in this case are undisputed. The Courts below decided the judgments against the petitioners on wrong conclusion from the actual facts of the case. They concluded that the case did not involve a reduction in the force in the section of the New York Regional Office of the Veterans Administration where the petitioners were employed. This is the only issue in the case as to whether

the reduction of a force from 36 employees to 27 employees constituted a reduction in force. It is admitted that if the matter was considered a reduction in force then the 27 employees to be retained must be the first 27 persons on the retention list in the order of their seniority, and that the petitioners would therefore be three of the twenty-seven employees to be retained.

The attorneys for the respondents in the Courts below worked out an ingenious theory that the matter was not at all a reduction in force as it clearly appeared to be, but it was in fact a promotion in grade for the employees retained. It is admitted at some later date the employees retained did receive a grade of GS-8, but the record is crystal clear that on the dates the employees were selected by the personal preference of their superiors and balloting that such a grade had not been assigned, and although the work was to be practically the same no grade had been assigned to it, and it could have been graded lower than a GS-7 or a higher grade of GS-8. In any reduction in force the use of the retention register must be used. The application of the statutes and the regulations governing the rights of employees must be and should by all means be applied as of the time that the selections of the employees to be retained.

Otherwise they may as well be totally disregarded. Of what use are the statutes and regulations unless they apply exactly at the time that the reduction in force took place. The record is clear that all 36 employees including these petitioners were fully qualified to be retained in their positions (A.27). That the petitioners, Frederick J. Cutting, Josephine B. Larsen, and Maybelle R. Maloney were all qualified (A.27). Testimony was also given that in selecting the employees to be retained they did not pick out the 27 employees who had the highest retention credits. Testimony was given that retention points are the number of years of federal service a per-

son has had working as a civilian employee of the federal government in addition to the time spent in military service (A.32), and that retention points are used primarily to determine in a case of reduction in force who is the person who should first go in a given category of employees and that assuming that two employees A & B each having the same qualifications but one having 10 retention points, and the other 9 retention points, the one with the 9 retention points goes first. (A.33)

The petitioners had the following retention points. Frederick J. Cutting 10-11, Josephine B. Larsen 29-11, and Maybelle R. Maloney 11-7. (A.31) Of those retained in the 27 persons selected are the following showing their retention points: Milton Cooper 12-0, Samuel Horton 10-4, Robert Hanifin 11-8, Bernard Schneider 10-11, James O. Burke 10-5, David A. Geller 11-1, Howard Kratky 10-8, Aaron I. Goldstein 18-2, Henry Williams, Jr. 12-0, John H. Duryea 12-10, Edward G. Stephenson 10-10, Charles W. White 12-1, Nathan W. Zomback 16-0, Herbert Glen 12-7, Joseph A. Nauer 12-2, Antero T. Jackson 10-10, August U. Gibson, Jr. 11-11, Rocco J. Bonelli 11-8, Richard J. Cleary 17-8.

From the foregoing it is apparent that employees with less retention points than the petitioners were selected to remain in the section, and the petitioners were demoted in grade from GS-7's to GS-4's.

The regulations of the United States Civil Service Commission relating to a reduction in force have been sustained by this Court. In the case of Earle W. Hilton v. John L. Sullivan, Secretary of the Navy, and the three members of the United States Civil Service Commission, 334 U.S. 323, 92 L.Ed. 1416, the regulations relating to reductions in force were upheld by this Court in a case brought by a nonveteran shipyard worker employed in the Charleston, South Carolina Shipyard. The petitioners

now, and at the time that the reduction in force took place, were all employees in the classification A-1 as is mentioned in the case of Hilton v. Sullivan, supra. That is to say that they were permanent civil service employees with veterans preference, and in the classification of A-1 which this Court sustained as a proper regulation in the Hilton v. Sullivan case.

The petitioners therefore predicate their case upon the decision of this Court in Hilton v. Sullivan, supra, sustaining the regulations relating to reductions in force, and the express provisions of Section 12 of the Veterans Preference Act of June 27, 1944 (5 U.S.C. 861) which provides as follows:

> "Sec. 861. Reduction in personnel; considerations affecting release. In any reduction in personnel in any cilivian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations WHICH SHALL GIVE DUE EFFECT TO TENURE OF EMPLOYMENT, MILITARY PREFERENCE, LENGTH OF SERVICE, and efficiency ratings; Provided, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service; Provided further, That preference employees whose efficiency rating are below 'good' shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: And provided further, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions. (June 27, 1944, ch. 287, Sec. 12, 58 Stat. 390.)" Emphasis supplied.
> 5 U.S.C. 861

The attention of the Court is particularly directed to the following language of the said Section 12:

> "In any reduction in force in personnel in any civilian service of any Federal Agency, competing employees shall be released in accordance with Civil Service Regulations which *shall* give due effect to tenure of employment, military preference, *length of service,* and efficiency ratings."

The selection of employees to be retained with less retention points was a plain, wilful, and deliberate violation of the petitioners' rights because all of them were qualified and all had longer service than some of the employees retained. If personnel officers are permitted to deliberately violate the regulations, and the statutory requirements, then in that case the Veterans Preference Act of June 27, 1944 is a mere mockery.

The respondents contend that these petitioners are seeking a promotion in grade. They are not asking for any such thing. They are simply asking that since they had preferential rights of retention in their grades that resort should have been made to the retention list, as required by the regulations and the provisions of Section 12, supra. Their rights must be adjudicated as of the date of the reduction in force, not at a later date when the job position was graded as a GS-8. If the petitioners had been retained, as they should have been, they would now be in a GS-8 position, but this is beside the point. At the time they were demoted, no one knew that those retained would eventually be placed in grade GS-8 positions.

The Courts below entirely ignored this undisputed fact.

The opinion of the Court below is a criterion which will furnish to the various heads of the Departments, Agencies and Bureaus in the District of Columbia a way

to curb the rights of veterans in Government employment. The action taken in this case is in clear violation of the petitioners rights, and since it may be used as a precedent in future cases involving reductions in force, the petition for a writ of certiorari should be granted.

WHEREFORE, The petitioners pray that a writ of certiorari may issue under the seal of this Honorable Court in this cause, directed to the United States Court of Appeals for the District of Columbia Circuit, that upon such a review that the decision and judgment of that Court be vacated, reversed, and set aside, and this cause remanded to the said Court of Appeals in accordance with the views of this Court.

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Attorney for the Petitioners.

APPENDIX

Filed May 17, 1956. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 12898

Frederick J. Cutting, et al., Appellants

v.

Harvey V. Higley, Administrator of Veterans Affairs, et al, Appellees

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Appeal from the United States District Court
for the District of Columbia

Decided May 17, 1956

Mr. Claude L. Dawson for appellants.

Mr. Robert S. Green, Attorney, Department of Justice, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of Court, with whom *Mr. Leo A. Rover,* United States Attorney at the time the brief was filed, and *Mr. Paul A. Sweeney,* Attorney, Department of Justice, were on the brief, for appellees. *Mr. Lewis Carroll,* Assistant United States Attorney, also entered an appearance for appellees.

Before EDGERTON, Chief Judge, and PRETTYMAN and DANAHER, Circuit Judges.

PRETTYMAN, *Circuit Judge:* Appellants were veterans' preference eligibles employed in the Regional Office of the Veterans Administration in New York. They were Claims Examiners in Grade GS-7, and their duties consisted of registering veterans for courses in educational institutions. Their positions were "desk jobs" requiring no work in the field.

In 1952 Congress passed an act[1] which, in the course of providing educational benefits for veterans, required the Veterans Administration to exercise closer supervision over schools and other establishments participating in the program. Consequent to that act the central office of the Administration in Washington determined upon a reorganization of the regional offices to provide for compliance surveys in the field. The position of Claims Examiner was abolished. A position in Grade GS-8, called an Educational Benefits Specialist, was created. A major function of such a specialist was to make field visits to educational institutions to inspect them and verify their compliance with the act; these specialists also were to perform about half of the duties formerly performed by the claims examiners. Another new position, in Grade GS-4, was created to care for some of the remainder of the work left over from the former Claims Examiner position.

In the New York office there were thirty-six claims examiners. The new organization provided for twenty-seven educational benefits specialists. The chief officials of the office set about the problem of selecting the personnel for the new positions. The chief and the assistant chief of the division and the personnel officer of the office discussed the matter and called together the supervisors of the four regional units and the chief and assistant chief of the section in which these employees were involved.

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[1] 66 STAT. 663, 38 U.S.C.A. § 901 *et seq.*

These six people examined the personnel records of the thirty-six employees, discussed their qualifications, and then balloted. The recommendations thus formulated were forwarded to the chief of the division, who made the final selection. Our appellants are among the nine former claims examiners who were not placed in the new Grade GS-8 position of Specialist. They were placed in the new GS-4 positions.

The present controversy revolves about the fact that Section 12 of the Veterans' Preference Act of 1944[2] provides that "In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings".

Appellants argue that the above-described events were a reduction in personnel and that therefore the selections for the new educational benefits specialists were required to be made on the basis of tenure, preference, length of service, and efficiency ratings and not upon the basis of evaluated qualifications. We cannot agree with this contention. Section 12 does not apply to promotions. The new Specialist position is notably different from the old Examiner position and requires additional aptitudes. The Commissioner of Veterans Cases was of the view that the old and new positions were in fact interchangeable. The District Court obviously rejected that view. We agree with the court. The change in position was not a mere upgrading. It was a real change in function.

The function of the old Claims Examiner having been abolished, every person in the grade for that position was released from that grade. There were no "competing employees" left in Grade GS-7. There being no

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[2] 58 STAT. 390, as amended, 5 U.S.C.A. § 861.

Grade 7 positions left in existence, the rights of appellants were to be reassigned to positions for which they were eligible at an equal or lower grade. The thrust of the statute and of the regulations[3] is that no employee can be reduced in pay or grade while a competing employee with lower retention standing is retained in the same competitive level. The rationale of the statute leads to the same result. The purpose is to preserve to preference eligibles the pay and status which they have, whenever some employees at their competing level are to be released from service or reduced in rank or pay. But this purpose has no application to the selection of employees for promotion to more important duties.

The District Court rendered summary judgment for the Administrator. Its judgment will be

Affirmed.

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[3] 5 C.F.R. § 20.5 (Supp. 1952).

Filed May 17, 1956 Joseph W. Stewart, Clerk

* * * *

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Chief Judge, and Prettyman and Danaher, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: May 17, 1956.

Per Circuit Judge Prettyman.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages numbered 1 to 67, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties and of the record and proceedings in said Court of Appeals, as designated by counsel for appellants, in the case of:

Frederick J. Cutting, et al., Appellants,

v.

Harvey V. Higley, Administrator of Veterans Affairs, et al., Appellees.

No. 12,898, April Term, 1956, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this fourth day of August, A.D. 1956.

(SEAL)

Clerk of the United States Court of Appeals for the District of Columbia Circuit.

By /s/ William G. Secrest,
William G. Secrest,
Deputy Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 317

FREDERICK J. CUTTING, ET AL., PETITIONERS

v.

HARVEY V. HIGLEY, ADMINISTRATOR OF VETERANS AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decisions of the Regional Director, Second United States Civil Service Region (Appendix B, *infra*, pp. 14-16) and of the Civil Service Commission's Board of Appeals and Review (Appendix C, *infra*, pp. 17-18) are not officially reported.[1] The Report of the District Court's Commissioner of Veterans Cases appears at R. 57A-61A. No opinion was filed by the

[1] The decisions of the Civil Service Commission, reproduced *infra* in Appendices B and C, are exhibits 3 and 4 annexed to respondents' motion for summary judgment.

District Court. The opinion of the Court of Appeals (Pet. 13-16) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 17, 1956 (Pet. 17). The petition for a writ of certiorari was filed on August 14, 1956. The jurisdiction of this Court may be rested upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' rights under the Veterans' Preference Act were violated when, upon the abolition of their position as Claims Examiner (Registration Officer), GS-7, petitioners were reassigned to the position of Claims Examiner (Eligibility Clerk), GS-4, instead of being promoted to the newly created position of Education Benefits Specialist, GS-8.

STATUTES AND REGULATIONS INVOLVED

Section 12 of the Veterans' Preference Act, 58 Stat. 390, 5 U.S.C. 861, and the pertinent parts of the Civil Service Regulations, 5 C.F.R. (1954 Cum. Supp.) §§ 20.2, 20.5, are set forth in Appendix A, *infra*, pp. 12-14.

STATEMENT

Petitioners are three veterans who, until April 1953, were employed in the New York Regional Office of the Veterans' Administration in the position of Claims Examiner (Registration Officer) in grade GS-7 (R. 6A-8A). Their duties consisted almost exclusively of registering veterans for courses in educational institutions, a desk job requiring no work in the field (R. 43A-44A; Pet. 14).

In January 1953, the New York Regional Office was advised by letter from Washington that a reorganiza-

tion and consolidation of functions in all Regional Offices would take place (R. 21A-22A; 34A; 43A).[2] This reorganization was prompted by the enactment of the Veterans' Readjustment Assistance Act of 1952 (66 Stat. 663, 38 U.S.C. 901 *et seq.*) which required the Veterans' Administration to exercise closer supervision than formerly over schools and establishments participating in the training programs (Dfts' Ex. 4; R. 43A; cf. 38 U.S.C. 977, 978).[3] As a specific step toward this objective, the Veterans' Administration decided to abolish the position of Claims Examiner (Registration Officer), GS-7, and to establish two new job classifications, *viz.*, Education Benefits Specialist, at Grade GS-8, and Claims Examiner (Eligibility Clerk), at Grade GS-4.[4] (R. 27A; 34A-36A.) To the new position of Education Benefits Specialist, which was to incorporate about 50% of the duties of the former Claims Examiner position, was assigned the additional major function of making field visits to educational institutions (R. 34A). Whereas the former position of Claims Examiner was wholly a desk job, employees in the new

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[2] This is the same reorganization as is involved in the petition for certiorari in *Wagner* v. *Higley, et al.*, No. 224 Misc., October Term, 1956. The instant case relates to the consequent abolition of the Claims Examiner position and the reassignment of the incumbents of that position; *Wagner* relates to the abolition of the Supervisory Claims Examiner position and the reassignment of one such Supervisor. The principal issue presented in both petitions is virtually the same.

[3] As its history makes clear, this statute was corrective legislation "designed to prevent or minimize the recurrence of the abuses and fraudulent practices which arose under the administration of the" prior Act. Senate Report No. 1824, 82d Cong., 2d Sess., p. 1.

[4] We shall hereafter refer to the former position of Claims Examiner (Registration Officer) as "Claims Examiner" and to the new position of Claims Examiner (Eligibility Clerk) as "Eligibility Clerk."

position of Education Benefits Specialist were to spend approximately one-half of their time in the field on compliance surveys to ensure that the educational institutions at which the veterans were being trained were functioning properly (R. 43A). The remainder of the desk duties formerly performed by the Claims Examiner were among those assigned to the new position of Eligibility Clerk (R. 27A, 35A-36A).

There were 36 Claims Examiners then employed in the New York Regional Office, under the direction of four supervisors (R. 26A; see fn. 2, p. 3, *supra*). The supervisors met with their Section Chief, with his Assistant, and with a personnel representative in February to evaluate personnel who might be best qualified to fill the prospective positions of Education Benefits Specialist (R. 7, 16-20, 26-28). The grade of the new position had tentatively been fixed at GS-8, with a possibility it would be GS-9 (R. 39A, 46A). It was understood that there would not be a sufficient number of the new positions to accommodate all 36 Claims Examiners (R. 25A-26A). A discussion as to the qualifications and record of each of the Claims Examiners was had, and by secret ballot each supervisor rated all 36 employees, considering (1) their qualifications for the new position, (2) their performance in their present position, and (3) where qualifications and performance were equal, length of service (R. 27A-28A, 31A, 43A, 46A-49A). On the basis of the ballots, a list of the comparative ratings of the 36 employees was drawn up and submitted to the Chief of the Division (R. 35A, 49A).

Early in March, the new position of Education Benefits Specialist was formally established and graded

GS-8, one grade higher than the abolished position of Claims Examiner. The New York Regional Office was authorized to make 27 appointments to this position. The Regional Office thereupon consulted the rating list prepared at the February conference and, on March 15, 1953, promoted to the new positions the 27 employees who stood highest on the list (R. 21A-23A). The remaining nine Claims Examiners, including petitioners, were notified on March 20, 1953, that that position was being abolished and that their services were being terminated at the close of business April 20, 1953 (Dfts' Exs. 1, 5, 6). Pursuant to reduction-in-force regulations then in effect, petitioners were offered and subsequently accepted reassignment as Eligibility Clerk, GS-4, the only available position at Grade GS-7 or lower for which they were eligible in the New York commuting area (Dfts' Exs. 2, 5, 6).

Petitioners appealed to the Second Region of the Civil Service Commission, alleging that the selection of employees for the new position of Education Benefits Specialist, GS-8, should have been based solely upon retention credits, and that, by appointing other former Claims Examiners having less retention credits than petitioners, the Veterans' Administration had violated Section 12 of the Veterans' Preference Act and the applicable Civil Service Regulations (*infra*, pp. 12-14). These contentions were rejected not only by the Civil Service Commission's Second Region but also by its Board of Appeals and Review following further appeal by petitioners (*infra*, pp. 14-18). The decisions of the Civil Service Commission held that appointment to the new Education Benefits Specialist position involved a promotion, that the Veterans' Administration could

not be required to make promotions on the basis of retention credits which govern only reductions in force, and that the agency had discretionary authority to select qualified and meritorious candidates for promotion even when a reduction in force is anticipated.

Petitioners then brought this action in the United States District Court for the District of Columbia (R. 3A-10A), seeking a declaratory judgment determining their rights and a mandatory injunction ordering respondents to restore the plaintiffs to the proper grades and positions in the United States Veterans' Administration (R. 10A). After respondents filed an answer (R. 12A-16A) and a motion to dismiss (R. 17A), which was subsequently denied (R. 55A), both parties moved for summary judgment (R. 54A-56A). The District Court, rejecting the report of its Commissioner of Veterans' Cases (R. 57A-60A), granted respondents' motion and denied that of petitioners (R. 61A). On appeal, the Court of Appeals for the District of Columbia affirmed in an opinion which, in general, follows the holdings of the Civil Service Commission (Pet. 13-16).

ARGUMENT

1. Petitioners' claim that their preference rights were violated when they were not appointed to the new and higher rated position has been rejected by two reviewing authorities within the Civil Service Commission and by both courts below. A further review by this Court is not warranted. No question of general importance or on which there is a conflict of decision is involved.[5] Indeed, their basic contention—that the

[5] There is no inconsistency between the decision below and *Hilton* v. *Sullivan*, 334 U.S. 323, relied on by petitioners. *Hilton* did not

new and the old positions were "practically the same," and therefore on the same competitive level (5 C.F.R. § 20.2(f), *infra*, p. 13)—presents essentially a factual issue. Not only was that issue decided adversely to them by both courts below (Pet. 15), thus bringing into play the two-court rule (*Comstock* v. *Group of Investors*, 335 U.S. 211, 214, and cases there cited), but also the decisions of the executive department as to whether or not two positions are comparable normally will not be judicially reviewed. *Campbell* v. *Devine*, 81 F. Supp. 657, 659 (D. D.C.) affirmed on the opinion below, 194 F. 2d 281 (C.A.D.C.), certiorari denied, 344 U.S. 826. Both the Civil Service Commission and the courts below have affirmed that petitioners' reassignment was accomplished with full observance of all their statutory and procedural rights. These holdings, as we show below, manifestly were correct.

2. Section 12 of the Veterans' Preference Act (*infra*, p. 12) confers job retention preferences and reassignment priorities on employees who are veterans, *vis-a-vis* other employees, in the event of a reduction in force. It provides that "competing employees" shall be released in accordance with Civil Service Regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings. Cf. 5 C.F.R. § 20.5(b)(1), *infra*, p. 13. But the retention advantages and priorities which the section confers on veterans have application only against employees who are within the same competitive group.

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deal with promotions. The two other cases they cite, *Fishgold* v. *Sullivan Corp.*, 328 U.S. 275, and *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, also dealt with veterans' rights to continued employment rather than to promotion, and differ from the present case in that they involve the standards established for private employment.

The language of the section, and its judicial construction, clearly establish that no prior right of reassignment or retention exists outside of the same competitive group. *Elder* v. *Brannan,* 341 U.S. 277, 283; *Fass* v. *Gray,* 197 F. 2d 587, 591 (C.A. D.C.), certiorari denied, 344 U.S. 839; *Powell* v. *Brannan,* 196 F. 8d 871, 873 (C.A.D.C.).

"Competing employees" is defined in the Regulations as "the position incumbent, if any, and employees who are qualified for the position." 5 C.F.R. § 20.2(c), *infra,* p. 13. When petitioners were reassigned from their former grade GS-7 position, no competing lower preference or nonpreference employee was retained in grade GS-7. The Claims Examiner, GS-7, position they formerly held no longer existed; *all* such positions were abolished in the reorganization brought on by the new legislation. The other lower preference employees, over whom petitioners claim seniority, were promoted to the newly established and basically different position of Education Benefits Specialist, GS-8. The effect of their promotion to that different job was to remove them from the competitive level on which petitioners' former position existed (see *infra,* pp. 9-10). There being no "competing employees" in grade GS-7, and that position having been eliminated entirely, petitioners were entitled, by reason of their seniority and retention credits under Section 12 of the Veterans Preference Act, not to promotion, but to be reassigned to positions for which they were eligible at an equal or lower grade. Their retention credits secured for them priority appointments to positions as Eligibility Clerks, GS-4, which were found by the employing agency and by the Civil Service Commission to be the highest classi-

fication within the commuting area for which petitioners were eligible (see *infra*, p. 15).

3. In arguing that the Veterans Administration's failure to appoint them to the new position of Education Benefits Specialist, GS-8, violated their veterans' preference rights, petitioners contend, in substance, that the new position was on the same competitive level as their former Claims Examiner, GS-7, position, and that therefore the employees who were selected for the new post were and still are competing employees within the meaning of Section 12. They premise their argument on two assertions, first, that the work of the new position was to be "practically the same" as that of the abolished one (Pet. 8), and, second, that no promotion was involved because when the employees were selected for the new position "no one knew" that it would be graded GS-8 (Pet. 8, 11). Both assertions are erroneous.

(a.) The record is clear that, far from being "practically the same," the duties and functions of the newly established Education Benefits Specialist position were substantially different from those of the Claims Examiner. This fact is crucial; indeed, it is fatal to petitioners' claim. For, two positions are not on the same competitive level unless they are "similar," and, further, unless the employees in them "could be readily interchanged, without undue interruption to the work program." 5 C.F.R. § 20.2(f), *infra*, p. 13. Here, the dissimilarity between the two positions is marked by the additional functions prescribed by the new legislation which prompted the reorganization involving the elimination of the old job and the creation of the new one. These functions represented a change from desk work exclusively to a position requiring a very sub-

stantial amount of field work; it was a change of function, from merely processing veterans for courses, to visiting the schools and educational institutions in which veterans were enrolled and undertaking to investigate their books and records to ensure compliance under the procedures set up by the new law (*supra*, pp. 3-4). These new duties in the field, directed toward compliance functions, comprised fully 50% of the work of the new position (*ibid.*).[6] As stated by the court below, "The new Specialist position is notably different from the old Examiner position and requires additional aptitudes. * * * The change in position was not a mere upgrading. It was a real change in function." Pet. 15. Accordingly, the two positions cannot be regarded as being on the same competitive level.

(b.) Contrary to petitioners' view, the record does indicate that, from the inception, it was known that the new position would be graded higher than the old one (*supra*, p. 4). It follows that petitioners' claim to the new position is really a claim to a promotion. Their "demand is in essence this: that [they] be selected for a higher rated post and paid a higher salary. Such a demand is primarily one for consideration and decision by the agencies involved and not by the courts. *Powell v. Brannan*, * * * 196 F. 2d 871; cf. *Ramspeck* v. *Federal Trial Examiners Conference*, * * * 345 U.S. 128, at page 138 * * * Nothing in the governing statutes and

[6] The record in *Wagner* v. *Higley, et al.*, No. 224 Misc., this Term, discloses that an extensive training program had to be set up for the new position of Education Benefits Specialist to instruct employees as to the functions of the new position. See our Brief in Opposition in that case at p. 4. The necessity of such training demonstrates that the new position was not "interchangeable" with the old one.

regulations gave [petitioners] a vested right to the appointment" they seek. *Nash* v. *Interstate Commerce Commission*, 225 F. 2d 42, 43 (C.A. D.C.), certiorari denied, 350 U.S. 953. As indicated by the Civil Service Commission, an agency is free to exercise its discretion in the selection of employees for promotion to a new and different position, even in anticipation of a reduction in force, for there is "no provision in the law or regulations that requires an agency to make promotions on the basis of retention standings which govern reductions in force" (*infra*, p. 18). Section 12 of the Veterans Preference Act contains no provision whatsoever guaranteeing preference employees any right or advantage in an agency's promotion action. On the contrary, the Civil Service Regulations dealing with procedures applicable to reductions in force and reassignment specifically provide that "*No agency shall be required* * * * *to promote any employee* * * *." 5 C.F.R. § 20.5(d) (*infra*, p. 13-14; emphasis added). Petitioners cite no case holding otherwise. The decisions below clearly were correct.

CONCLUSION

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
MELVIN RICHTER,
LESTER S. JAYSON,
Attorneys.

SEPTEMBER 1956.

APPENDIX A

Statutes and Regulations Involved

1. Section 12 of the Veterans' Preference Act, 58 Stat. 390, 5 U.S.C. 861, provides:

> In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further,* That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further,* That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

2. Civil Service Regulations in effect at pertinent times herein provide in material part (5 C.F.R. [1954 Cum. Supp.] §§ 20.2, 20.5):

§ 20.2 *Definitions.* For the purposes of the regulations in this part definitions are given for words, terms and phrases as follows:

* * * * *

(c) "Competing employees" for any position in a reduction in force means the position incumbent, if any, and employees who are qualified for the position.

* * * * *

(f) "Competitive level" means all similar positions within a competitive area in which employees could be readily interchanged, without undue interruption to the work program. (Generally such positions will be in the same grade or occupational level, but this is not necessary if the other tests are met.)

* * * * *

(h) "Retention credits" are credits given for length of government service and performance ratings.

* * * * *

§ 20.5 (b) *Employees in positions in the competitive service.* (1) No employee may be separated, or furloughed for more than thirty days, or reduced in pay or grade in a reduction in force while a competing employee with lower retention standing is retained in the same competitive level.

* * * * *

(d) *Reasonable change in position.* Any change in position under these regulations is reasonable if it is made without reduction in grade or pay.

If a reduction in grade or pay cannot be avoided, any such change is reasonable if made with the least reduction required to conform with these regulations. Employees are not required to be given options as to alternative changes possible in any particular case. No agency shall be required to fill a vacant position, or to promote any employee, or to transfer any employee to a different duty station, and no agency shall be prohibited from taking such administrative actions. No employee rendering satisfactory service in a position shall be required to be displaced by a competing employee who is not qualified for such position under the regulations in this part.

APPENDIX B

Letter of Decision of Regional Director, Second United States Civil Service Region

UNITED STATES CIVIL SERVICE COMMISSION
SECOND UNITED STATES CIVIL SERVICE REGION
COMPRISING THE STATES OF NEW YORK AND NEW JERSEY
OFFICE OF THE DIRECTOR, NEW YORK 14, N. Y.

May 7, 1953.

Mr. FREDERICK J. CUTTING,
162 West 13th Street,
Apt. 64,
New York, New York.

DEAR MR. CUTTING:

Reference is made to your appeal from the action taken by the Veterans' Administration Regional Office, 252 Seventh Avenue, New York, N. Y., in separating you from the position of Claims Examiner (Registration Officer) GS-7 through reduction in force.

Inquiry made as a result of your appeal reveals that your name appears on the retention register for the position of Claims Examiner (Registration Officer) GS-7 in retention sub-group I-A inasmuch as you possess competitive Civil Service status, you are entitled to veteran preference and because you have a performance rating of not less than "Satisfactory." Your name was reached in proper order in the reduction in force that affected you inasmuch as all employees in retention subgroup I-A have been reached for separation.

Your employing agency informed this office that it was not possible to offer you reassignment or transfer in lieu of separation above grade GS-4 as there were no vacant continuing positions nor were there any positions occupied by incumbents with lower retention rights at grades GS-5, 6, and 7 for which you were considered to be qualified by the agency. In order to ensure that you were afforded proper consideration for reassignment, the Veterans' Administration Regional Office was asked to furnish us with a list of all positions occupied by employees with less retention preference at grades GS-5, 6, and 7. Under date of April 27, 1953, you were furnished with a copy of this list and asked to advise this office as to whether or not you considered yourself qualified within the meaning of the retention preference regulations for reassignment to any of these positions. As of the date of this letter, no reply has been received to our request.

The employing agency has advised this office that you have been offered and have accepted reassignment to the position of Eligibility Clerk GS-4.

In submitting your appeal, and at the joint hearing afforded you and other employees similarly affected, which was held at this regional office on April 16, 1953, you contended that you should have been promoted to

the position of Educational Benefits Representative GS-8 and that the method used by the Veterans' Administration Regional Office in selecting employees for promotion to these positions was unfair and discriminatory. Under the current regulations governing reductions in force, no agency is required to promote an employee who has been reached for separation in his own position. Furthermore, the selection of employees for promotion is an administrative matter wholly within the discretion of the employing agency, subject only to the restriction that the persons selected meet the Civil Service Commission's qualifications requirements and standards for the positions.

In view of the information outlined above and since inquiry has failed to disclose any violation of your rights under governing regulations in the action taken by the employing agency in your case, there is no basis for favorable action on your appeal.

Sincerely yours,

JAMES E. ROSSELL,
Regional Director.

APPENDIX C

Letter of Decisi

Cision of Board of Appeals and Review, Civil Service Commission

UNITED ST

STATES CIVIL SERVICE COMMISSION
Washington 25, D. C.

Mr. MICHAEL J. C

September 4, 1953.

Chairman, Ter
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Jamaica

OPPELT,
nth Judicial District,
egion,
maica Avenue,
a 2, Long Island, New York.

DEAR Mr. OPPEL

LT:

Your appeal f from the decision of the Commission's Second Civil Ser rvice Region, concerning the separation of Frederick J. Cutting, Lillian Donaghy, David H. Jaffe, Catherine Kirwan, Josephine B. Larsen, Maybelle R. Maloney , and Bernard Rothenberg from their positions in the V Veterans' Administration Regional Office, New York, N New York, in a reduction in force, has been carefully co onsidered by this Board.

Prior to the re eduction in force, these employees were in a group of thir rty-six, all entitled to preference under the Veterans Pre eference Act, serving under permanent appointments as Claims Examiners (Registration Officers) GS-7. A dditional functions were required by new legislation, a nd new positions as Educational Benefits Representati ives, GS-8, were established to supersede the position s of Claims Examiners (Registration Officers) GS-7. As a result of a decreased workload, fewer employees were required in the new GS-8 positions than were c urrently serving in the old GS-7 positions. Promotion ns were made from the old GS-7 positions to staff the e new GS-8 positions on the basis of the agency's app raisal of the relative qualifications of

the candidates for the higher grade work. The remaining superseded positions were then abolished, and action was taken with respect to the position incumbents under regulations governing reductions in force.

You contend that the agency erred in exercising discretion in the selection of employees for promotion in anticipation of a reduction in force. You propose that the Veterans' Administration should have based the promotions on the relative standings of the candidates under retention preference regulations. This would have favored these appellants because they have longer service than some of those who were promoted. However, we find no provision in the law or regulations that requires an agency to make promotions on the basis of retention standings which govern reductions in force. There is no evidence of error on this point.

Allegations of sex discrimination have been made because four women were not selected for promotion, but are not supported by evidence that such discrimination was intended or practiced. A very careful review of the entire promotion program was made by a committee with a woman as chairman and it found no evidence of sex discrimination.

There is no error in the appealed decision and it is affirmed.

Your appeal is denied.

Sincerely yours,

(S.) JEB 9/2/53,
JOHN E. BLANN,
Chairman, Board of Appeals and Review.

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